No. 93-7200

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HENRY LEE MCCOLLUM, Petitioner

v.

STATE OF NORTH CAROLINA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

STATE'S BRIEF IN OPPOSITION

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The Respondent, the State of North Carolina, by and through its undersigned counsel, the Honorable Michael F. Easley, Attorney General of North Carolina, and David Roy Blackwell, Special Deputy Attorney General, requests this Court to decline to summarily reverse the North Carolina Supreme Court and deny the Petition for Writ of Certiorari filed by petitioner Henry Lee McCollum seeking review of the decision by the North Carolina Supreme Court in *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993).

OPINION BELOW

JURISDICTION

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Satisfied with the Petitioner's statements of the **OPINION BELOW, JURISDICTION,** and **CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED**, North Carolina omits these items pursuant to Supreme Court Rules 15.2 and 24.2.

STATEMENT OF THE CASE

A. Procedural History

A Robeson County, North Carolina Grand Jury, on 3 January 1984, returned true bills of indictment charging the petitioner with the first degree rape and first degree murder of Sabrina Buie. Petitioner stood trial at the 8 October 1984 session of Robeson Superior Court, Judge Arthur Lee Lane presiding. The jury returned verdicts of guilty as to both charges on 23 October 1984. On 25 October 1984, the jury recommended the trial court impose a sentence of death for the first degree murder conviction. Petitioner appealed as a matter of right. The North Carolina Supreme Court reversed the convictions and remanded the cases for

a new trial. *State v. McCollum*, 321 N.C. 557, 364 S.E.2d 112 (1988).

On 1 January 1991 a Robeson County Grand Jury returned a superseding indictment charging the petitioner with the first degree murder of Sabrina Buie. The petitioner, at arraignment, entered pleas of not guilty as to both the rape and murder charges. Petitioner filed numerous pretrial motions, including a motion to suppress his statement to the law enforcement officers. The trial court denied the motion to suppress and, following a change of venue, petitioner stood trial at the 4 November 1991 session of Cumberland Superior Court, the Honorable Jack A. Thompson presiding. The jury convicted the petitioner of first degree murder based upon felony-murder, as well as first degree rape.

Following a sentencing hearing conducted pursuant to N.C.G.S. § 15A-2000 (1988), the jury returned a recommendation of death. In so doing, the jurors found unanimously, and beyond a reasonable doubt two (2) aggravating circumstances: that the capital felony was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody [N.C.G.S. § 15A-2000(e)(4)]; and that the capital felony was especially heinous, atrocious or cruel [N.C.G.S. § 15A-2000(e)(9)]. The jurors considered some nineteen (19) separate mitigating circumstances. They found as statutory mitigating circumstances: the petitioner possessed no significant history of prior criminal activity [N.C.G.S. § 15A-2000(f)(1)]; and the petitioner committed the capital felony while under the influence of a mental or emotional disturbance [N.C.G.S. § 15A-

2000(f)(2)]. As nonstatutory mitigating circumstances, the jurors found: the petitioner's mental retardation; that he was easily influenced by others; that he has difficulty thinking clearly when under stress; that he voluntarily cooperated with the police by making a confession at an early stage of the criminal process; and that he adapted to the disciplined environment of prison and committed no infractions from 1983 through 1991. The jurors determined, unanimously and beyond a reasonable doubt, that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances found were sufficiently substantial to warrant imposition of the death penalty. The jurors then recommended the death penalty. Judge Thompson imposed a sentence of death for the murder conviction.

Petitioner appealed to the North Carolina Supreme Court as a matter of right. On 30 July 1993, the North Carolina Supreme Court affirmed the convictions and the death sentence. *State v. McCollum*, 334 N.C. 209, 433 S.E.2d 144 (1993).

B. Factual Background

> On Saturday, September 24th, I was standing at the intersection of Richardson Street and Old Maxton Road. This was about 9:30 p.m. Sabrina Buie and Darrell Suber came out of Sabrina's house and walked toward me. Louis Moore and Chris, I don't know Chris's last name, they walked up to the stop sign where we were. Just a few minutes later my brother Leon Brown came up to the stop sign.
>
> All six of us walked down the road to the little red house near the ball park. All five of us boys tried to get Sabrina to give all of us some pussy. She wouldn't do it. Darrell and Chris left and went to Harry's store and got a six pack of Bull Malt Liquor Schlitz, sixteen ounce cans. A few minutes later, Chris and Darrell came

back with the beer. Nobody messed with Sabrina at the red house.

Darrell Suber, Chris, Louis Moore, my brother Leon and me talked about taking some pussy from Sabrina. I agreed to do this. Chris said, 'I'm going to be first.' Darrell said he was going to be second, I was going to be third and Leon was fourth. Louis said, 'Fuck y'all, I'm leaving,' and left.

Darrell talked Sabrina into going down in the woods behind Harry's store. Darrell, Leon, Chris, Sabrina and myself walked across the bean field to the woods behind Harry's store. We walked across the ditch and Darrell and Chris picked up a board about two or three feet wide and about six feet long and carried it to the woods at the edge of the field. All five of us went into the woods at the edge of the field. Me, Darrell and Sabrina still had our beer cans. Darrell still had the plastic holder around his beer can.

We sit there in the bushes, heavy bushes, and drank our beer. And Darrell said, 'I'm sure going to get some of that pussy.' Sabrina did not say anything. At this time I grabbed Sabrina's right arm and Leon grabbed her left arm. Sabrina started hollering, 'Mommy. Mommy.' Sabrina was hollering and crying. Darrell took off Sabrina's shoes, then pants and then her panties. Sabrina had on a little skinny belt on, too. Chris picked up Sabrina's clothes and Darrell jumped on the girl and took him some pussy. Sabrina was crying and hollering, 'Mommy. Mommy.' Sabrina was saying, 'Please don't do it. Stop.' She, Sabrina, kept on hollering, 'Don't. Stop. Mommy. Mommy.'

Darrell finished screwing her and he got up. Chris got on top of Sabrina, raped her, screwed her, fucked her. Chris finished. Sabrina was laying there looking pitiful. I was third to get on her and fuck Sabrina. While I was screwing her, Chris held her left arm and Darrell held her right arm. I didn't shoot off in her. After I finished, Leon turned her over. Chris and Leon turned her over and Leon screwed Sabrina in her butt. Leon finished.

When we all four screwed Sabrina, we had her laying on the board. After we all four screwed her, Darrell said, 'We've got to do something because she'll go up town and tell the cops we raped her.' Darrell said, 'We got to kill her to keep her from telling the cops on us.'

Sabrina had not been cut on. The panties had not been stuck in her throat. Chris picked up a stick and tied Sabrina's pink panties on the stick. I grabbed her right arm and held her. Leon grabbed her left arm and held her on that side. Sabrina was completely naked laying on the board crying. Chris knelt over Sabrina's head and took both hands and started jigging the stick in her mouth. Chris was trying to choke Sabrina to death with her panties on the stick. The stick broke. Chris got a bigger stick and kept pushing the panties down her throat. While Chris was using the stick, Darrell was cutting her with a knife he had. Darrell wiped the blood off his knife with some of Sabrina's clothes and put his knife back in his little case on his belt. The knife had black handles and was a fold-up type. Sabrina was trying to get up during this but me and Leon held her down.

After she was cut and the panties stuck in her windpipe, she stopped breathing and struggling and we knew she was dead. I grabbed her right arm and Chris had her left arm. She still had -- she still had her top and bra on but was naked on the bottom. Chris had thrown the rest of her clothes in the woods near where we killed her.

We drug Sabrina up the edge of the woods toward the ditch and stopped in the edge of the woods. We drug her to hide her body. Chris said, 'We'll dig a hole and leave her here.' Chris started digging and dug a small hole a couple of inches deep. Chris couldn't dig with his hands so he quit. Darrell said, 'Let's take her up in the bean field and leave her.'

I grabbed her right arm, Chris her left arm and we drug her into the field and left her laying on her back. Chris took her blouse off. She had her bra pulled up over her breasts. Her breasts were showing. Chris threw her white blouse in the ditch. The blouse had a little flower on it. The blouse was dirty and nasty. The sweater had blood -- had the flower on it.

We all went home. Chris said we should never have raped and killed her.

We spent about one hour with Sabrina from the time we got her in the woods and left her body.

Darrell had blood on his brown corduroy jacket and Nike gray tennis shoes with a burgundy seal. Chris had blood on his sneakers, New Yorkers.

> While we were in the woods, Darrell was smoking Newport cigarettes. Chris smoked Newports, also and had a box of small stick matches.
>
> After we killed Sabrina, I got home about 1:30 a.m. Sunday morning.
>
> We left three beer cans in the woods where we killed Sabrina. I was not drunk and knew what I was doing when we killed Sabrina.

Statement of Henry Lee McCollum given to law enforcement officers at the Red Springs Police Department on 28 September 1983.[1] Petitioner also completed a map, marking an "X" where he killed Sabrina, drawing a line leading to a dot where the gang attempted to dig a grave to bury the child, and drawing a final line from the dot to where they left Sabrina's body.

A family friend located Sabrina's body in a bean field near a clump of woods inside the Red Springs, North Carolina city limits on 26 September. Law enforcement officers collected physical evidence at the scene on the 26th and again on the 28th following an autopsy. The physical evidence collected included Schlitz Malt Liquor beer cans, a plywood board with a reddish stain, wooden matches, and a Newport cigarette butt in the crime scene area. The officers also observed drag marks along the ground as well as an area of earth described as "disturbed, dug up somewhat."

Dr. Deborah L. Radisch, the Associate Chief Medical Examiner of the State of North Carolina, performed the autopsy on Sabrina

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[1] Contrary to the implications in the petition, the officers, acting on a tip, visited petitioner's home on 28 September and asked him to voluntarily accompany them to the police station. Petitioner did so. While meeting with the officers, petitioner remained free to leave. They did not place him under arrest until after he confessed.

Buie's body on 27 September 1983. Dr. Radisch observed abrasions over the face, particularly by the right eye and right chin, going onto the neck. The right side of the neck bore a bruise as well. Dr. Radisch detected very small areas of hemorrhage or bleeding within the eyeballs. The stoppage of blood flow to the head or the stopping of breathing by obstruction caused the vessels to fill up with blood and then rupture.

The back of Sabrina's body contained large numbers of linear abrasions caused by dragging the body with the back along a rough surface. Dr. Radisch observed a laceration or tear deep in the back of the vagina. The small amount of bleeding indicated that the lesion occurred shortly prior to death. In the doctor's opinion, blunt traumatic injury or some sort of blunt object applied with force, possibly a male sex organ, caused the laceration. Dr. Radisch took swabs from the vaginal and anal area, but detected no sperm. The length of time between the Saturday death and Tuesday autopsy made the absence of sperm not unusual. Dr. Radisch also observed several short or small lacerations in the mucosa, the delicate lining tissue of the anal opening. She believed these lacerations caused by a blunt object, consistent with a male sex organ.

Dr. Radisch detected no obvious bullet or stab wounds, and, upon initial examination of the internal organs, detected no obvious trauma beyond small amounts of bleeding and a swelling of the brain. That swelling, in the doctor's opinion, resulted from

a deprivation of oxygen to the brain for a period of time before death.

Upon removing the neck organs, Dr. Radisch observed a wadded up pair of panties forced into the airway with a stick. The panties completely obstructed the airway. Forcing the panties down a person's throat required, in the doctor's opinion, a moderate to large degree of force. Dr. Radisch noted that Sabrina's esophagus or upper airway contained a hole in the back of it most likely caused by the stick going through this tissue. In Dr. Radisch's opinion, Sabrina died due to suffocation from the airway obstruction by the panties. Unconsciousness would have resulted in maybe two to three minutes, with death occurring after four to five minutes.

State Bureau of Investigation Special Agent David Hedgecock testified as an expert in Forensic serology examinations. His studies revealed blood stains on two wooden sticks and the plywood board taken from the crime scene. The plywood board and the larger stick bore human blood matching Sabrina Buie's. The small stick contained a blood stain, but due to the small quantity and the soft wood, the serologist could not determine the blood characteristics.

The petitioner presented no evidence at the guilt-innocence phase. The jury returned a verdict of guilty of first degree murder and guilty of first degree rape.

Petitioner proffered a great deal of sentencing evidence from family, friends, and former teachers and administrators. He also presented expert psychological testimony from Dr. Faye Sultan.

Petitioner's former teachers and school administrators described him as educable mentally retarded. At the age of thirteen (13), petitioner functioned at between a third and fourth level. Mrs. Marinaro, a former teacher, acknowledged that petitioner would know the difference between right and wrong, never displayed any signs of physical abuse, and appeared well dressed and well nourished. School records from the fall of 1975 (age 12) indicated that the administrators considered petitioner overly aggressive. They reported his IQ as 61 (educable mentally retarded). Petitioner's Wide-Range Achievement Test results showed a reading level of 3.2 (third school year, second month), a spelling level of 3.7, and an arithmetic level of 2.8. Subsequent testing in March 1978 (age 15) revealed a reading recognition of fourth grade level and reading comprehension at a 2.9 level; fair gross motor ability; and satisfactory auditory discrimination. The records also contained descriptions of petitioner's violent temper and poor conduct.

Dr. Sultan met the petitioner twelve times between 29 June 1990 and 27 October 1991, with the first meeting occurring almost seven (7) years after the September 1983 killing. The meetings lasted for an average of ninety (90) minutes, with the total interview time amounting to between seventeen and twenty hours. A master's-degreed psychologist conducted formal psychological testing.

Dr. Sultan concluded that McCollum suffers from educable mental retardation. Mental retardation means not only intellectual

deficit, but also social adaption: the ability to deal with information flow from the environment; the ability to formulate social relationships; the appropriateness of those social relationships, the things that we call social maturity, social skill; the ability to have conversation; and the ability to respond to stressful situations and be able to think clearly through those situations.

McCollum, Dr. Sultan concluded, suffers an inability to understand instructions at his grade level or near his age level. McCollum functions at an estimated mental age of eight (8) to ten (10). That age precisely matched his IQ score of 69 on a 1990-- test. Previous scores ranged from 61 in 1975 to 56 in 1978. The Wide-Range Achievement Test showed he functioned on a beginning third grade level. Reading comprehension tests, however, revealed a one year, ninth month level. Reading comprehension measures his ability to put words into a context that makes sense.

Petitioner suffers from an inability to pay attention or to stay focused on a particular subject, and a tendency to pick pieces of information out of context. McCollum's comprehension level drops when the stress level increases. Psychologically, McCollum is a highly dependent person who is very anxious to please and eager to gain the approval of others. He is also suggestible. Petitioner suffers from an overall depression and a sense of helplessness throughout his life, and experiences a great difficulty with interpersonal relationships.

After extensive testimony, Dr. Sultan expressed her opinion that McCollum is mentally disturbed and retarded, and exhibits the qualities of being emotionally disturbed. Petitioner also appears subject to the dominance and influence of others. In her opinion, McCollum possesses the capacity to appreciate the criminality of his acts, but not the ability to conform his conduct to the requirements of the law. He possesses difficulty anticipating the logical consequences of his actions, and extreme difficulty thinking clearly under stress. Dr. Sultan also believes Petitioner suffers from post-traumatic stress disorder stemming from an incident around the age of ten or eleven when he was raped by a man.

Based upon his retardation and post-traumatic stress, Dr. Sultan expressed the opinion that Petitioner would be substantially impaired in his ability to form an intent to do a series of acts under stress. He possesses a severely impaired ability to formulate an intent to carry out a series of actions. On redirect examination, Dr. Sultan expressed the opinion that the petitioner functions very well in a structured environment and sometimes quite poorly in an unstructured environment.

On rebuttal, the State offered the testimony of L.P. Sinclair given at the original trial of this case. Sinclair was shot to death in Robeson County in 1990, prior to the petitioner's retrial. Sinclair earlier testified that on the evening of 24 September 1983, he met Leon Brown at Brown's house. Brown accompanied Sinclair to Lisa Logan's home to attend a party. McCollum and

Chris Brown arrived. McCollum and Leon almost fought, but Leon finally calmed down. Sinclair, McCollum, Leon Brown and Chris Brown left at 11:20 p.m. Ultimately, Sinclair separated, and the remaining three huddled up. McCollum said "I'm going first." Then Leon said "I'm going first." This went back and forth between the two some five (5) or eight (8) times. McCollum then called over to Sinclair "Let's go get some pussy from Sabrina. We'll take her back there in the back woods." Sinclair declined.

The next day, Sunday afternoon, at approximately 3:30 p.m., Sinclair met McCollum on the street. Warning Sinclair not to tell, McCollum said "We got some of that pussy. We tore it up." McCollum added "We killed her."

Lee Sampson, formerly a Special Agent with the North Carolina State Bureau of Investigation, observed the petitioner testify at the first trial. There, McCollum related to the jury dates, times and places, people he had talked to and the conversations with those individuals. McCollum testified that he was not involved with the death of Sabrina Buie and that he was somewhere else. Sampson noted that, on cross-examination, McCollum maintained the answers he provided on direct examination. Despite a lengthy and in depth cross-examination, McCollum kept his story straight.

REASONS THE WRIT OUGHT NOT ISSUE

I. THE TRIAL JUDGE'S INSTRUCTIONS PROPERLY LIMITED THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL." THE TRIAL JUDGE'S INSTRUCTIONS, AS GIVEN, EVIDENCE NO VIOLATION OF *TISON V. ARIZONA* OR *ENMUND V. FLORIDA*.

Petitioner asserts that this Court should issue its writ and summarily reverse the North Carolina Supreme Court's opinion upholding the jury instructions given by the trial judge concerning the especially heinous, atrocious or cruel aggravating circumstance. Alternatively, petitioner seeks this Court's Writ of Certiorari to allow review of the instructions. Petitioner asserts two overriding constitutional errors: first, the trial court failed to limit the application of the circumstance to petitioner's personal conduct and mental state; and second, the trial court's instructions concerning especially heinous, atrocious or cruel utilized the same language found unconstitutionally vague by this Court. Each purported error, petitioner asserts, separately violated his Eighth and Fourteenth Amendment rights and involved a misapplication of *Godfrey v. Georgia*, 446 U.S. 420 (1980), *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Shell v. Mississippi*, 498 U.S. 1 (1990). Petitioner presents his argument in four (4) separate sections: Section A presents his view of the applicable law; Section B asserts the challenged instruction failed to focus the jury on his personal conduct in and culpability for the killing; Section C argues that the first portion of the trial judge's instructions unconstitutionally defined especially heinous, atrocious or cruel; and Section D asserts that the concept of

brutality contained in the instructions fails to cure the otherwise fatal constitutional defects. None of these contentions find support in the law or the record.

A. This Court's Standard For Reviewing the Constitutionality of Instructions Limiting The Scope of Otherwise Overbroad Aggravating Circumstances.

The Eighth and Fourteenth Amendments require that a capital sentencing scheme suitably direct and limit the sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious action. The State must '"channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death."' *Arave v. Creech*, ___ U.S. ___, ___, 113 S. Ct. 1534, 1540 (1993).

When asked to determine whether a particular aggravating circumstance constitutionally limits the class of defendants subject to the death penalty,

> [A] federal court. . . must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, i.e., whether they provide *some* guidance to the sentencer.

Walton v. Arizona, 497 U.S. 639, 654 (1990). As this Court also noted in *Walton*, 497 U.S. at 655, "the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision. . . ."

In this case, the jury made the sentencing determination. Under such circumstances, the trial court must give the jury a constitutional limiting definition of the challenged aggravating factor which goes beyond the bare terms of an aggravating circumstance unconstitutionally vague on its face. *Id.*

A review of this record indicates the trial court properly instructed the jury concerning the especially heinous, atrocious or cruel aggravating circumstance. The writ ought not issue.

B. The Trial Court Properly Applied This Aggravator To The Defendant Following His First Degree Murder Conviction Based Upon A Felony Murder Theory.

Petitioner contends that his actions in killing Sabrina Buie do not rise to the level of participation sufficient to bring him within the holding of *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987). Therefore, since the jury acquitted him of first degree murder by premeditation and deliberation, thereby finding that he did not intend to kill, and convicted him of first degree murder under the felony murder rule, the trial court should not have submitted the especially heinous, atrocious or cruel aggravator. Petitioner cites *Lankford v. Idaho*, ___ U.S. ___, ___, 111 S. Ct. 1723, 1731 (1991) as support for this assertion. Citing *Enmund v. Florida*, 458 U.S. 782, 801 (1982), petitioner asserts that "The death penalty may not be constitutionally imposed on petitioner, a severely retarded individual with the capacity of a nine-year old who was easily

influenced by others, based on the culpability of others." [2] Pet. at 11.

Enmund involved a defendant, not at the scene of the killing, who did not kill, did not attempt to kill, did not intend that a killing take place or that the participants employ lethal force. *Tison* construed the *Enmund* holding to allow imposition of a death sentence upon a major participant in an underlying felony who demonstrated a reckless indifference to human life. Here, the trial judge charged the jury at the sentencing phase of the proceeding that, prior to a death recommendation, they must find unanimously and beyond a reasonable doubt the defendant himself killed the victim, or intended to kill the victim, or was a major participant in the underlying felony and exhibited reckless indifference to human life. App. p. 38. The jurors so found.

Petitioner's contention that he did not kill similarly fails.

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[2] Nothing in the record supports the assertion of severe retardation. In fact, petitioner's public school records classed him as educable mentally retarded, with an I.Q. score of 61. Petitioner's own expert, Dr. Faye Sultan, testified that her associate tested petitioner just prior to the trial. Dr. Sultan reported petitioner scored a 69. This corresponded well with test scores from his childhood which ranged from 61 in 1975 to 56 in 1978, and supported the educable mental retardation assessment.

The State also challenged petitioner's claimed submissiveness and stress induced mental difficulties. Dr. Sultan opined that petitioner easily fell under the dominance and influence of others, and experienced extreme difficulty thinking clearly under stress. In rebuttal, Lee Edward Sampson, former Special Agent with the North Carolina State Bureau of Investigation, observed petitioner's first trial. There, petitioner testified in an alibi defense and denied all involvement with Sabrina Buie's murder. Despite lengthy and in depth cross examination, petitioner kept his story straight. Additionally, the prior testimony of L.P. Sinclair, admitted at this trial, revealed petitioner as one of the leaders who attempted to involve Sinclair in the planned gang rape.

The record evidence, from his own statement, indicates that, following Darrell Suber's assertion "we got to kill her to keep her from telling the cops on us", petitioner held one of Sabrina's arms while Leon Brown held the other and Chris Brown jigged her panties down her throat until she ceased her struggle and died. *Id.* As an active participant in Sabrina Buie's murder, petitioner stands apart from either *Tison* or *Enmund*, and plainly bears personal responsibility for this killing. Petitioner's reliance on *Lankford v. Idaho*, 111 S. Ct. 1723, 1731, is misplaced. In *Lankford*, this Court noted only that the evidence probably failed to support the trial judge's finding that the murder of the victims was especially heinous, atrocious or cruel and manifested exceptional depravity, particularly where Lankford was not the actual killer. Nothing in petitioner's case impacts the *Lankford* holding.

Petitioner contends that the jury found he did not intend to kill when it acquitted him of an intentional first degree murder by premeditation and deliberation. Therefore, the trial court could not submit this aggravating circumstance since finding the circumstance implies that petitioner formed an intent to kill. The jurors entered a yes on the verdict sheet in response to the question asking if they found the petitioner guilty under the felony murder theory, but made no entry on the verdict sheet in the space in response to the question asking if they convicted him on the basis of malice, premeditation and deliberation. *State v. McCollum*, 334 N.C. 208, 220, 433 S.E.2d 144, 150 (App. p. 7).

The North Carolina Supreme Court noted that juries convict criminal defendants of crimes, not theories, and that petitioner stood convicted of first degree murder and acquitted of nothing. *State v. McCollum*, 334 N.C. at 221, 433 S.E.2d at 150-51 (App. pp. 7-8). The court declined to speculate concerning the jury's consideration, if any, of the premeditation and deliberation theory. Under these circumstance, petitioner establishes no constitutional issue.

C. The Trial Court's Instructions Concerning the Especially Heinous, Atrocious or Cruel Aggravator Provided the Jury With Sufficient Guidance.

D. The Brutality Portion of the Heinous, Atrocious or Cruel Aggravator Sufficiently Channels the Jury's Consideration of the Evidence.

N.C. Gen. Stat. § 15A-2000(e)(9) (1988) provides, as an aggravating circumstance, that "The capital felony was especially heinous, atrocious, or cruel." Petitioner contends that, applied to him, the circumstance is vague and meaningless on its face; that the jury instructions provide no guidance to the jury; and that even if partially constitutional, the constitutional portion falls with the unconstitutional portion since the trial court allowed the jury to find this circumstance on alternate theories. A review of the record and the law reveals no certiorari worthy issue.

North Carolina first construed the especially heinous, atrocious or cruel circumstance in *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979). In *Goodman*, the North Carolina Supreme Court applied a constitutionally narrowed construction of the

statutory language, requiring that the "brutality involved in the murder in question must exceed that normally present in any killing" or the murder was "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Id.* at 25, 257 S.E.2d at 585. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983) followed. In *Oliver*, North Carolina identified two factual situations which constitutionally permitted submission of this circumstance: (1) killings in which the victim suffered great physical agony; and (2) killings in which the victim endured less violence or physical agony than the first category, but suffered the infliction of psychological torture by lying helplessly aware of impending death. So narrowed, the especially heinous, atrocious or cruel aggravating circumstance passes constitutional muster. *See Sochor v. Florida*, ___ U.S. ____, 112 S. Ct. 2114 (1992); *Lewis v. Jeffers*, 497 U.S. 764 (1990); *Walton v. Arizona*, 497 U.S. 639 (1990); *Maynard v. Cartwright*, 486 U.S. 356 (1988).

North Carolina's pattern jury instructions concerning the especially heinous, atrocious or cruel aggravating circumstance accurately reflect the narrowed interpretation of this aggravator provided by the North Carolina Supreme Court. Here, the trial court instructed the jury in accord with the North Carolina Pattern Instructions which most trial judges utilize. Judge Thompson charged:

> Issue two -- or aggravating circumstance two, was this murder especially heinous, atrocious or cruel?
>
> In this context, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. And cruel means designed to inflict a high degree

> of pain with utter indifference to or even enjoyment of the suffering of others.
>
> However, it is not enough that this murder be heinous, atrocious or cruel, as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

In *Sochor v. Florida*, 112 S. Ct. 2114, and *Proffitt v. Florida*, 428 U.S. 242, 255 (1976), this Court approved, as constitutionally narrowed, an instruction which defined the especially heinous, atrocious or cruel aggravator as 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' Furthermore, in *Maynard v. Cartwright*, 486 U.S. 356, 364-65, this Court expressed approval of Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance which limited application of the aggravator to killings involving "some kind of torture or physical abuse." This Court approved a similar instruction limiting this aggravator in *Proffitt v. Florida*, 428 U.S. 242, and again in *Walton v. Arizona*, 497 U.S. 639. Thus, in a series of cases, this Court has approved instructions concerning the especially heinous, atrocious or cruel aggravating circumstance which narrow and focus the jury upon the excessive brutality of the particular killing. The challenged instruction here specifically does so.

In an attempt to deconstruct the instruction, petitioner considers the instruction in two separate segments, and argues that

the language constitutes nothing other than pejorative terms which fail to limit the breadth of the aggravating circumstance. The limitation of this aggravator to brutality in excess of that normally present in a killing specifically charges the jury with the responsibility to make a factual determination drawn from the actual circumstances of the crime as those circumstances appear in the evidence. Furthermore, as this Court well recognizes, "the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision. . . ." *Walton v. Arizona*, 497 U.S. at 655.

The excessive brutality instruction provides meaningful guidance to the jury and plainly narrows the class of murderers falling within this aggravating circumstance. Excessive brutality does not describe all murders, and jurors may utilize their common sense and life experiences to compare the brutality of the killing before them to other killings. Unfortunately, rather than rarified knowledge distilled from police experience available only to officers and prosecutors (and the occasional interested citizen), the news media and the entertainment businesses, on a routine basis, expose the average juror to the most intimate details of numerous killings. This life experience represents a uniform frame of reference for all jurors which, in conjunction with the trial court's instructions, allows the jurors to restrict the class of first degree murderers eligible for the death penalty.

Petitioner also complains that the brutality instruction directs the jurors to the crime as a whole, as opposed to the

trauma to the victim. The North Carolina Supreme Court has consistently held that "excessive brutality" refers to the perpetrator's actions which cause the victim to suffer physical or psychological abuse. *See, e.g., State v. Huffstetler*, 312 N.C. 92, 115, 322 S.E.2d 110, 125 (1984), *cert. denied*, 471 U.S. 1009 (1985) (prolonged battering of head and upper body with a frying pan); *State v. Lloyd*, 321 N.C. 301, 318-19, 364 S.E.2d 316, 327-28 (1988) (repeated kicking and seventeen stab wounds); *State v. McNeil*, 324 N.C. 33, 56, 375 S.E.2d 909, 922-23 (1989), *cert. denied, vacated, and remanded on other grounds*, 494 U.S. 1050 (1990), *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942, 111 S. Ct. 1403 (1991) (victim choked, shot, beaten, stabbed, hit in face with board and sexually assaulted); *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, ___ U.S. ___, 114 S. Ct. 392 (1993), *rehearing denied*, No. 93-5077, 1994 WL 4178 (U.S.N.C. 10 January 1994) (twenty-eight (28) stab wounds). Thus, based upon prior North Carolina decisions, the especially heinous, atrocious or cruel aggravating circumstance, when limited by the jury instructions based upon case law, provides sufficient guidance to the sentencer. The Constitution requires no more.

Petitioner asserts that the trial judge's instructions allowed the jury to find the aggravating circumstance on one of three alternate theories. Thus, even if the brutality instruction proves constitutionally sufficient, the entire instruction still must fall. Petitioner cites *Shell v. Mississippi*, 498 U.S. 1, 3-4, in support of his contention.

A review of *Shell* indicates that the trial court separately defined heinous, then atrocious, and then cruel, with the definition of cruel arguably more concrete than the definition of either heinous or atrocious. The instruction allowed the jury to find the circumstance on any one of the three basis. Here, the trial court specifically applied the excessive brutality qualification to all three words as a whole; heinous, atrocious and cruel. The instruction treats "heinous, atrocious or cruel" as a single entity, not three alternate theories upon which the jury might base a finding in aggravation. Thus, *Shell* does not apply to the petitioner's case.

This Court has repeatedly declined to review North Carolina's instructions concerning the especially heinous, atrocious or cruel aggravating circumstance, petitioner presents no new basis for review, and the instructions constitutionally limit application of the circumstance and guide the jury in determining the petitioner's sentence. *See State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, and *State v. Jennings*, 333 N.C. 579, 430 S.E.2d 188, *cert. denied*, ___ U.S. ___, 114 S. Ct. 644 (1993). Petitioner thus fails to raise any certiorari worthy issue.

II. THE TRIAL COURT ALLOWED PETITIONER FULL AND COMPLETE VOIR DIRE EXAMINATION. PETITIONER DEMONSTRATES NO CERTIORARI WORTHY ISSUE BY THE TRIAL COURT'S REFUSAL TO ALLOW DEFENSE COUNSEL TO QUESTION PROSPECTIVE JURORS CONCERNING THE AMOUNT OF TIME THE DEFENDANT WOULD BE REQUIRED TO SERVE IN PRISON UPON BEING SENTENCED TO LIFE IN PRISON FOR FIRST DEGREE MURDER.

Petitioner seeks this Court's Writ to review the North Carolina Supreme Court's decision holding that the trial court

properly declined to permit voir dire concerning whether the prospective jurors' views of parole eligibility. Alternatively, petitioner asserts that this case raises issues similar to those in *Simmons v. South Carolina*, No. 92-9059, and requests that this Court hold this case pending its decision in *Simmons*. A review of the record here indicates that petitioner presents this Court with an issue of state law unworthy of review. Petitioner's case stands apart from the facts and law in *Simmons*.

In a pretrial motion, petitioner requested that "the Court permit him to ask questions of potential jurors during jury selection about the jurors' views on the amount of time the defendant will be required to serve in prison upon being sentenced to life in prison for first degree murder." App. p. 78. The judge denied the motion, and the North Carolina Supreme Court affirmed that denial without citation, noting that it had previously decided this and other issues against the petitioner here. This is, in fact, the case. *See State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279 (1987), *cert. denied*, 484 U.S. 918 (1987); *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569 (1982), *cert. denied*, 459 U.S. 1080 (1982).

North Carolina treats parole eligibility as irrelevant to the sentencing determination, and thus holds the voir dire inquiry of potential jurors concerning their understanding of parole neither constitutionally required nor desirable. *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909. This Court left such decision with the states. In *California v. Ramos*, 463 U.S. 992 (1983), this Court upheld the

constitutionality of California's policy choice that jurors in capital cases should be aware of the governor's power to commute a life sentence without possibility of parole. In that decision, this Court noted that while the state could constitutionally present such information to the jury, the constitution did not mandate such instruction. Instructions or comments on commutation or parole eligibility remained an issue for state decision. *California v. Ramos*, 463 U.S. at 1013 n.30. Petitioner here presents no circumstances justifying review of that decision.

A change in North Carolina law renders this issue undeserving of certiorari review. Pursuant to recently enacted legislation, the trial court will instruct future capital sentencing juries concerning parole eligibility. *See* 1993 N.C. Sess. Laws Ch. 538 § 29.

Petitioner attempts to expand *Morgan v. Illinois*, ___ U.S. ____, 112 S. Ct. 2222 (1992), to encompass and support his petition. In *Morgan*, this Court held that a capital defendant possessed the right, on voir dire, to ask whether a juror would automatically vote to impose a sentence of death, in an attempt to determine whether that juror would follow the law. *Morgan* is, in fact, merely the mirror image of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Morgan* neither holds, nor even suggests, that a trial judge must permit defense counsel to question potential jurors concerning matters deemed irrelevant to the sentencing inquiry simply because defense counsel speculates that the potential jurors may harbor misconceptions concerning such matters. *Morgan* only

requires inquiry into whether a juror would automatically reject consideration of a life sentence or, in short, refuse to follow the law. Beyond such constitutionally mandated inquiry, *California v. Ramos*, 463 U.S. 992 remains controlling.

This Court should not hold this case pending a decision in *Simmons v. South Carolina* (No. 92-9059). The questions before this Court in *Simmons*, and the statutory foundations for those questions, differ from the question petitioner wishes this Court to consider. *See State v. Simmons*, 427 S.E.2d 175 (S.C. 1993), *cert. granted*, 114 S. Ct. 57 (1993). Under South Carolina law, life imprisonment means life without possibility of parole. Petitioner here acknowledges that life imprisonment in North Carolina means he would be eligible for parole in twenty years. In *Simmons*, the jurors specifically inquired concerning the possibility of parole. Here, petitioner does not assert that any of the jurors made such inquiry. In *Simmons*, the district attorney argued that the petitioner posed a grave risk of future violence unless executed. Here, petitioner makes no assertion that the district attorney so argued. In *Simmons*, petitioner sought a jury instruction informing the jury that, if sentenced to life imprisonment, he would be ineligible for parole under state law. Here, petitioner sought to voir dire the jury concerning their belief as to the amount of time petitioner would serve in prison if sentenced to life imprisonment. Thus, the circumstances in petitioner's case distinguish it from the issues this Court will decide in *Simmons*.

Petitioner presents no justification for a review of the trial court's actions in light of the specific facts here, the change in North Carolina law, and this Court's controlling precedent. This Court should deny review.

III. PETITIONER DEMONSTRATES NO CERTIORARI WORTHY ISSUE BY THE TRIAL COURT'S DECISION TO BEGIN JURY SELECTION ANEW AS A REMEDY FOR THE PROSECUTOR'S RACIALLY MOTIVATED PEREMPTORY CHALLENGES.

Petitioner requests that this Court grant Certiorari to review the trial court's decision, upon finding that the prosecutor engaged in racially motivated peremptory challenges, to begin jury selection anew with a completely different jury panel. The North Carolina Supreme Court found this course of action the preferable remedy under the circumstances. *See State v. McCollum*, 334 N.C. 208, 234-35, 433 S.E.2d 144, 158-59. The North Carolina Supreme Court also found any error in that procedure harmless beyond a reasonable doubt to the petitioner since, if the North Carolina Supreme Court granted relief, he would simply obtain a trial by a new jury, something he obtained in any event by the *Batson v. Kentucky*, 476 U.S. 79 (1986), remedy ordered by the trial court. *McCollum*, 334 N.C. at 234-35, 433 S.E.2d at 158-59. Petitioner asks that this Court hold that seating the improperly challenged jurors constitutes the only proper remedy for the exercise of racially motivated peremptory challenges. Only such remedy, petitioner asserts, protects the constitutional rights of the improperly struck jurors. Petitioner cites *Powers v. Ohio*, ___ U.S. ___, 111 S. Ct. 1364 (1991), and *Georgia v. McCollum*, ___ U.S. ___, 112 S. Ct. 2348 (1992), as support for his position.

Petitioner fails to demonstrate to this Court how he suffered any prejudice by the trial judge's action. Petitioner makes no assertion that the jurors who actually sat and sentenced him to die were selected in a racially discriminatory manner. Nor does petitioner contend that the prosecutor's conduct in making racially motivated peremptory strikes evidences an endemic pattern or practice. While Petitioner may possess standing to raise the claim for the excluded jurors, he can demonstrate no prejudice to his defense by the trial court's decision, and the excluded jurors remain free to sue.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court expressed no view concerning the appropriate remedy (seating the improperly struck jurors or beginning jury selection anew), in a particular case, for the exercise of racial peremptory challenges. *Batson*, 476 U.S. at 100 n.24. This Court expressed no preference for either of these suggested remedies in either *Powers* or *Georgia v. McCollum*. Thus, the decision rests within the trial court's discretion.

Petitioner demonstrates no prejudice by the trial judge's action. Petitioner presents this Court with no circumstances which this Court has not already considered in either *Powers* or *McCollum*. Thus, petitioner demonstrates no certiorari worthy issue.

IV. NEITHER DOUBLE JEOPARDY NOR COLLATERAL ESTOPPEL PROHIBIT THE JURY AT THE SENTENCING PROCEEDING FROM FINDING THAT PETITIONER KILLED TO AVOID OR PREVENT A LAWFUL ARREST AND THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL EVEN THOUGH THE JURY FAILED TO RETURN A VERDICT AS TO MURDER BY PREMEDITATION AND DELIBERATION.

Petitioner seeks this Court's Writ of Certiorari to review the propriety of allowing a sentencer to find two aggravating circumstances which require proof of intent to kill following the jury's purported acquittal of him on the theory of premeditated murder with specific intent to kill. Petitioner asserts that such conduct violates double jeopardy and collateral estoppel principles and his Fifth, Eighth and Fourteenth Amendment rights. This Court recently decided this issue against petitioner, and this petition presents no justification to review this issue.

The trial court submitted a verdict form to the jury on which it could indicate whether it found the petitioner guilty of first degree murder and, if so, whether it did so on the basis of premeditation and deliberation or on the basis of the felony murder doctrine. The jury found the petitioner guilty of first degree murder, and wrote "yes" in the blank beside the issue. The jury also wrote "yes" in the blank beside the felony murder theory, but made no entry in the blank beside the malice, premeditation and deliberation theory. *See* App. p. 7. Petitioner asserts that the jury, therefore, acquitted him of murder by premeditation and deliberation. Furthermore, he contends that since intent constitutes an essential element of the aggravating circumstances

submitted, the acquittal collaterally estops the State from relitigating those issues.

Petitioner asserts that this Court faces the same issues in *Schiro v. Clark*, 113 S. Ct. 2330 (1993), *affirmed*, No. 92-7549, 1994 WL 9939 (U.S. 19 Jan. 1994). On 19 January 1994, this Court decided *Schiro v. Farley*, No. 92-7549, 1994 WL 9939. In its opinion, this Court held that the State stands entitled to one fair opportunity to prosecute the defendant, and "that opportunity extends not only to prosecution at the guilt phase, but also to present evidence at an ensuing sentencing proceeding." *Schiro v. Farley*, 1994 WL 9939 at *6. A sentencing proceeding is not a successive prosecution. Secondly, this Court held that Schiro failed to meet the burden of establishing the factual predicate for the application of the collateral estoppel doctrine because the jury could have grounded its verdict upon an issue other than Schiro's intent to kill. *Schiro*, at *9.

Here, as the North Carolina Supreme Court noted, the jury's failure to complete the sentencing form concerning the premeditation and deliberation theory leaves to absolute speculation the question of whether the jury found petitioner did not form an intent to kill after premeditation and deliberation. Thus, petitioner here, like the petitioner in *Schiro*, fails to establish the factual predicate for the application of the collateral estoppel doctrine. This Court should deny the Writ.

CONCLUSION

Petitioner here presents no certiorari worthy issues for resolution by this Court. This Court should decline to summarily reverse the decision of the North Carolina Supreme Court and deny the Writ.

Respectfully submitted, this the 24th day of January 1994.

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January 24, 1994

Mr. William K. Suter, Clerk
Supreme Court of the United States
Office of the Clerk
One First Street, N.E.
Washington, D.C. 20543

Re: *McCollum v. State of North Carolina*
No. 93-7200

Dear Mr. Suter:

Enclosed please find for filing the original, plus ten copies of State's Brief in Opposition in the above-referenced case. Please mark the additional copy filed and return it in the enclosed self-addressed stamped envelope.

Sincerely,

David Roy Blackwell
Special Deputy Attorney General

Enclosures

No. 93-7200

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HENRY LEE MCCOLLUM, Petitioner

v.

STATE OF NORTH CAROLINA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

CERTIFICATE OF SERVICE

I, David Roy Blackwell, a member of the Bar of this Court, hereby certify that on this 24th day of January, 1994, one copy of the State's Brief in Opposition to the Petition for Writ of Certiorari in the above-entitled case was mailed, first class postage prepaid, to Gordon Widenhouse, Assistant Appellate Defender, Office of the Appellate Defender, Post Office Box 1070, Raleigh, North Carolina 27602, counsel for the Petitioner. I further certify that all parties required to be served have been served.

This the 24th day of January, 1994,

Respectfully submitted,

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